United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

in the
United States Court of Appeals
for the Second Circuit

CASE NO. 74-1388

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RAUL ORTEGA-ALVAREZ, a/k/a
RAUL ORTEGA, et al,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF THE CASE AND THE FACTS

On April 2, 1971, Raul Ortega was indicted in the United States District Court for the Southern District of Florida under Indictment No. 71-155-Cr-JE for conspiracy to violate the drug laws of the United States. Also named as co-conspirators in that action were Romero Gonzalez, Miguel Rodriguez, Joaquin Prada, Carlos Bonos-Layo, and Carlos Sarmiento.

The conspiracy allegedly took place between January 20, 1970, and March 13, 1970, and among the overt acts cited was that the above co-conspirators flew on March 4, 1970, to Westbury, Long Island, New York, and that on March 13, 1970, these same conspirators including the Defendant Ortega, transferred a kilo of heroin to Special Agents Angioletti and Tummillo at 165th Street and Amsterdam Avenue, New York, New York. No substantive counts were charged against Ortega in spite of alleged overt acts.

Just prior to trial, the Assistant United States Attorney for the Southern District of Florida, one Harold Keefe, approached the attorney for the Defendant Ortega and inquired as to whether a plea of guilty by the Defendant could be secured with respect to the Indictment No. 71-155-Cr-JE. Counsel hereinbefore mentioned negotiated a plea to the effect that since Title 21 U.S.C. Sections 173 and 174 mandated a minimum mandatory sentence of five (5) years without parole, the Defendant would plead guilty to an Information whereby he would still receive five (5) years but that such sentence would not be mandatory and he would be eligible for parole at such time as the Government saw fit to release him on parole. Based on such negotiations between counsel, the Government, with the consent of the Court, filed Information No. 71-281-Cr-EC for the purpose of the Defendant pleading guilty thereto in substitution and in satisfaction of Indictment No. 71-155-Cr-JE.

Thereafter and on the very date the Defendant entered his plea of guilty which alleged violation of the Narcotics Tax Law, the Defendant pursuant to the agreement with the prosecution was sentenced to five (5) years.

Defendant served approximately fifteen (15) months in the United States Penitentiary at Atlanta, Georgia, and was released on parole wherein he reported twice per week each and every week. He also became gainfully employed and it was never alleged anywhere that Defendant made any other violation of any other law. However, and notwithstanding his plea of guilty in Florida in satisfaction of the indictment charging conspiracy, the Defendant Ortega was re-indicted in the United States District Court for the Southern District of New York under Indictment No. 73 Cr. 750 charging that the Defendant Ortega, together with Ramiro Gonzalez, Miguel Rodriguez, Joaquin Prada, Carlos Banos-Layo and Carlos Sarmiento together with many others, violated Title 21 U.S.C., Sections 173 and 174, the exact violations and co-conspirators as were charged in the Florida indictment. The Bill of Particulars and subsequent trial of that action revealed that Agents Frank Tummillo and Thomas Angioletti and Howard Safir were the investigating and arresting officers in the Southern District of New York case and in the Southern District of Florida case. Additionally, a kilo of heroin which was to be introduced in Florida under the indictment charging the conspiracy in Florida was re-introduced in the trial of Indictment No. 73 Cr. 950 in the Southern District of New York.

The Indictment No. 73 Cr. 950 in the United States District Court for the Southern District of New York, charged Ortega and the same co-conspirators mentioned in the Florida case together with many other conspirators with violating Sections 173 and 174 of Title 21, United States Code in a conspiracy beginning December, 1969, up to and about April 30, 1970; and also charged Ortega in two substantive counts of receiving, concealing, buying and

selling heroin in or about the month of March, 1970, both in the Southern District of New York.

The Defendant, prior to trial on Indictment No. 73 Cr. 950, and at all times during the trial, moved to dismiss the Indictment on the grounds that Ortega's Constitutional Rights for Due Process of Law and his right against double jeopardy were being violated.

POINT INVOLVED ON APPEAL

THE APPELLANT IS ENTITLED TO INVOKE THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AGAINST DOUBLE JEOPARDY WHEN HE HAS PLED GUILTY TO AN INFORMATION SUBSTITUTED AS SATISFACTION TO AN INDICTMENT CHARGING HIM WITH VIOLATION OF THE NARCOTICS LAWS WHEN CONFRONTED WITH A NEW INDICTMENT CHARGING THE SAME OR SIMILAR CRIME IN ANOTHER JURISDICTION.

ARGUMENT

It is respectfully submitted that the government has prosecuted the Appellant Ortega twice for the same crime. The Appellant served a sentence of approximately fifteen (15) months plus parole supervision on a guilty plea which resulted in a five (5) year sentence in the United States District Court for the Southern District of Florida; and, then after being released on parole for that offense was indicted, convicted and sentenced to a term of twelve (12) years in the United States District Court for the

Southern District of New York. The cast of characters including the co-conspirators and the investigative agents were the same. The only difference between the two cases lay in the fact that in the Florida case the conspiracy as to Ortega ran from January 20, 1970, to March 13, 1970; while in the New York case the conspiracy as to Ortega began in December, 1969, and ran through April 30, 1970. The facts in both conspiracies were the same except for those which were produced in the New York trial for the extended month of the conspiracy. The overt acts alleged in both conspiracies, as to Ortega, encompassed the early part of March, 1970. No substantial charges based on the overt act were framed against the Appellant Ortega in the Florida case.

The Fifth Amendment provides: "Nor shall any perso be subject for the same offense to be twice put in jeopardy of life or limb."

The fundamental policy behind the Double Jeopardy Clause has been expressed many times, but never more clearly than by Justice Black in *Green v. United States*, 355 U.S. 184 at 187-188, 2 L.Ed.2d 199, 78 S.Ct. 221, 223:

> The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

This guarantee was so basic to our form of government that the Framers included it in the Bill of Rights. The facts in the instant case beg for the implementation of such basic rights on genuine analysis rather than on literalism when the issue involves a man's freedom.

This Court is asked to look realistically in the instant case in the light of the Fifth Amendment of the United States' Constitution so as to guarantee a person against the imposition of double jeopardy and to not allow the Federal Government to prosecute anyone in a never-ending series of litigations.

On April 2, 1971, Raul Ortega was indicted in the United States District Court for the Southern District of Florida under Indictment No. 71-155-Cr-JE for conspiracy to violate the drug laws of the United States. Also named as co-conspirators in that action were Romero Gonzalez, Miguel Rodriguez, Joaquin Prado, Carlos Bonos-Layo and Carlos Sarmiento.

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approached the attorney for the Defendant Ortega and inquired as to whether a plea of guilty by the Defendant could be secured with respect to the Indictment No. 71-155-Cr-JE. Counsel hereinbefore mentioned negotiated a plea to the effect that since Title 21 U.S.C. Sections 173 and 174 mandated a minimum mandatory sentence of five years without parole, the Defendant would plead guilty to an Information whereby he would still receive five years but that such sentence would not be mandatory and he would be eligible for parole at such time as the Government saw fit to release him on parole. Based on such negotiations between counsel, the Government with the consent of the Court, filed Information No. 71-281-Cr-EC for the purpose of the Defendant pleading guilty thereto in substitution and in satisfaction of Indictment No. 71-155-Cr-JE.

Thereafter and on the very date the Defendant entered his plea of guilty which alleged violation of the Narcotics Tax Law, the Defendant pursuant to the agreement with the prosecution was sentenced to five (5) years. Defendant served approximately fifteen (15) months in the United States Penitentiary at Atlanta, Georgia, and was released on parole wherein he reported twice per week each and every week. He also became gainfully employed and it was never alleged anywhere that Defendant made any other violation of any other law. However, and notwithstanding his plea of guilty in Florida in satisfaction of the indictment charging conspiracy, the Defendant Ortega was re-indicted in the United States District Court for the Southern District of New York under Indictment No. 73 Cr. 950 charging that the Defendant Ortega, together with Ramiro Gonzalez, Miguel Rodriguez, Joaquin Prada, Carlos Banos-Layo and Carlos Sarmiento together

with many others violated Title 21 U.S.C., Sections 178 and 174, the exact violations and con-conspirators as were charged in the Florida indictment. The Bill of Particulars and subsequent trial of that action revealed that Agents Frank Tummillo and Thomas Angioletti and Howard Safir were the investigating and arresting officers in the Southern District of New York case as they were in the Southern District of Florida case. Additionally, a kilo of heroin which was to be introduced in Florida under the indictment charging the conspiracy in Florida was re-introduced in the trial of Indictment No. 73 Cr. 950 in the Southern District of New York.

The Indictment No. 73 Cr. 950 in the United States District Court for the Southern District of New York, charged Ortega and the same co-conspirators mentioned on the Florida case together with many other conspirators with violating Sections 173 and 174 of Title 21, United States Code, in a conspiracy beginning in December, 1969, up to and about April 30, 1970; and also charged Ortega in two substantive counts of receiving, concealing, buying and selling heroin in or about the month of March, 1970, both in the Southern District of New York.

The Defendant, prior to trial on Indictment No. 73 Cr. 950, and at all times during the trial, moved to dismiss the Indictment on the grounds that Ortega's Constitutional Rights for Due Process of Law and his right against double jeopardy were being violated.

At the outset the Appellant wishes to anticipate and dispose of the argument made by the Government that because the Appellant pled guilty to a substantive Information which involved a tax charge rather than to the Indict-

ment containing the conspiracy to violate the narcotics laws he can not now claim double jeopardy to a conspiracy count involving the violation of narcotics laws of Sections 173 and 174 of Title 21, United States Code.

The situation in the instant case is no different as to double jeopardy attaching when a person pleads guilty or is found guilty of a lesser embraced offense. The United States Supreme Court in the case of *Green v. United States*, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221, held that where at the first trial the jury returns a verdict of guilty to a lesser embraced offense, this is an implicit acquittal of the graver crime; and thereafter the Federal Government can not bring the defendant to trial for the more serious offense.

Here, as the record reveals, the Information to which the Appellant pled guilty was clearly in substitution and *in satisfaction* of the Indictment charging the Appellant with the violation of the narcotics laws of Sections 173 and 174 of Title 21, United States Code. The Appellant received a sentence of five (5) years of which he served approximately fifteen (15) months. To say that this does not constitute "double jeopardy" is unreal. It is rather amazing that the Government can take the position that a person can serve time in jail without ever having "been in jeopardy."

The next question to be answered is whether the conspiracies are different crimes or whether one is an extension of the other. It is clear the conspiracy is one and the same since they contain the same heroin, same co-conspirators (except for others who came in as addition-

al conspirators during the extended time period), and the investigative agents are the same.

Conspiracy has been defined as a partnership in criminal purposes, the duration of which lasts from its commencement until the partnership is ended. If there is a continuing objective of the parties to the conspiracy, there is a *single offense* despite the existence of diverse ways and means to accomplish it. *U.S. v. Koontz*, 257 F.Supp.2d (USDC Md. 1966); *Braverman v. U.S.*, 317 U.S. 49, 52-54, 63 S.Ct. 99, 87 L.Ed. 23 (1942); *Short v. U.S.*, 4th Cir., 1937, 91 F.2d 614, 617-18, 112 A.L.R. 969; *U.S. v. Swift*, (D.C. 111, 1911) 188 F. 92, 97.

The Government can not split up one conspiracy into different indictments and prosecute all of them. The prosecution of any part of a single crime bars any further prosecution based upon the whole or parts of the same crime. *U.S. v. Weiss*, 293 F. 992, 994 (D.C. Cir.).

The character and effect of a conspiracy are not to be judged by dismembering it and viewing it in its separate parts but by looking at it as a whole. It is the common design which is the essence of the conspiracy or combination and this may be made to appear when the parties steadily pursue the same object while acting separately or together, by common or different means but always leading to the same unlawful result. *American Tobacco v. U.S.*, 147 F.2d 93 (6th Cir. 1945); *U.S. v. American Honda Motors Co.*, 271 F.Supp. 979, 986 (DCND Cal. 1967).

The Appellant also invokes the Petite Rationale in furtherance of its argument.

The *Petite* case concerned indictments returned successively in the Eastern District of Pennsylvania and in the District of Maryland. The Pennsylvania indictment charged that the defendant Petite (a Baltimore attorney) conspired between October 21, 1951, and February, 1954, with five others to violate 18 U.S.C. Section 1001 by making false statements to the Immigration and Naturalization Service in a deportation proceeding. Among the overt acts enumerated in the two conspiracy counts were allegations that the alien whom Petite was representing and one other had "made certain sworn statements in Baltimore, Maryland" on February 14, 1952, and June 16, 1952. Petite pleaded *nolo contendere* to the conspiracy count. He was subsequently indicted in the District of Maryland on two counts of subornation of perjury in violation of 18 U.S.C. Section 1622, with the indictment citing a number of specific perjurious statements made by the Baltimore witnesses on the two dates in question. The District Court and the Court of Appeals rejected Petite's argument that the second indictment and trial amounted to double jeopardy.

Petite's Petition for Certiorari asserted that the two indictments were identical because, "by the very nature of the crime involved, petitioner could not have conspired with (his co-defendants) and suborned them at the same time." The Solicitor General responded that not only did the two indictments differ in that one alleged a conspiracy and the other the commission of a substantive offense, but also because the conspiracy "was not a conspiracy to suborn perjury, but a conspiracy to make false and fraudulent statements to any agency of the United States, in violation of 18 U.S.C. 1001."

Entirely sua sponte, however, the Solicitor General went on to say that while the decision was "correct, as a matter of law, both on authority and on reason," the "subject of separate punishments for related acts" was presented by the case, and the Department was studying "whether the initiation of the second prosecution was consistent with the policy of the Department with respect to the separate prosecutions of related acts."

The case was, of course, never argued on the merits. The Court granted certiorari (306 U.S. 908), but on December 1, 1959, the Solicitor General filed a "motion to vacate the judgment and dismiss the indictment" on the ground that the District of Maryland indictment had inadvertently violated the Federal Government's policy "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by consideration both of fairness to defendants and of efficient and orderly law enforcement."

The issue now turns on whether double jeopardy attaches to the substantive counts of which the Appellant was convicted in the New York case of which he was not charged in the Federal Case in Florida. The Appellant again wishes to stress the comment earlier made that the facts in this case should be viewed on a genuine analysis rather than on a literal interpretation of precedent.

There is no question that under most circumstances the Government can prosecute a defendant for a number of offenses at consecutive trials even though they may arise out of the same occurrence. The Supreme Court in the case of *Haig v. New Jersey*, 356 U.S. 464, 2 L.Ed.2d

983, 78 S.Ct. 839, averred such position, but nevertheless recognized that in some cases due process might be violated by consecutive prosecutions. "The question in any given case," said the Court, "is whether such a course has led to fundamental unfairness."

With this in mind, the Appellant brings into focus the case of *Ashe v. Swenson*, to implement the theory of "collateral estoppel" in this case. In *Ashe v. Swenson*, 397 U.S. 436, 453, 90 S.Ct. 1189, 1199 (1970), Mr. Justice Brennan with the concurrence of Mr. Justice Douglas and Mr. Justice Marshall wrote:

> In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances to join at one trial all the charges against a defendant that grows out of a single criminal act, occurrence, episode, or transaction. This "same transaction" test of "same offense" not only enforces the ancient prohibition against vexation multiple prosecutions embodies in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience. Modern rules of criminal and civil procedure reflect this recognition. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-726, 86 S.Ct. 1130, 1137-1139, 16 L.Ed.2d 218 (1966). Although in 1935 the American Law Institute adopted the "same evidence" test, it has since replaced it with the same transaction test. England, too, has abandoned its surviving rules against joinder

charges and has adopted the "same transaction" test. The Federal Rules of Criminal Procedure liberally encourages the joining of parties and charges in a single trial. Rule 8(a) provides for joinder of charges that are similar in character, or arise from the same transaction or from connected transactions or from part of a common scheme or plan. Rule 8(b) provides for joinder of defendants. Rule 13 provides for joinder of separate indictments or informations in a single trial where the offenses alleged could have been included in one indictment or information. These rules represent consideration and thought concerning the proper structuring of criminal litigation.

The same thought is reflected in the Federal Rules of Civil Procedure. A pervasive purpose of those Rules is to require or encourage the consolidation of related claims in a single lawsuit. Rule 13 makes compulsory (upon pain of a bar) all counterclaims arising out of the same transaction or occurrence from which the plaintiff's claim arose. Rule 14 extends this compulsion to third-party defendants. Rule 18 permits very broad joinder of claims, counterclaims, cross-claims, and third-party claims. Rule 19, 20 and 24 provide for joinder of parties and intervention by parties having claims related to the subject matter of the action. Rule 23 permits the consolidation of separate claims in a class action; See particularly Rule 23(b)(3).

In addition, principles of res judicata, and collateral estoppel caution the civil plaintiff against splitting his case. The doctrine of pendent jurisdiction has furthered single trials of related cases. See *United Mine Workers v. Gibbs*, supra. Moreover, we have recognized the jurisdiction of three-judge courts to hear statutory claims that require their convening. See e.g., *United States v. Georgia Pub. Serv. Comm.*, 371 U.S. 285, 287-288, 83 S.Ct. 397, 398-399, 9 L.Ed.2d 317 (1963); *King v. Smith*, 392 U.S. 309, 98 S.Ct. 2128, 20 L.Ed.2d 1118 (1968).

It is true that these developments have not been of a constitutional dimension, and that many of them are permissive, and discretionary rather than mandatory. Flexibility in the rules governing the structure of civil litigation is appropriate in order to give the parties the opportunity to shape their own private lawsuits, provided that injustice, harassment or an undue burden on the courts does not result. Some flexibility in the structuring of criminal litigation is also desirable and consistent with our traditions. But the Double Jeopardy Clause stands as a constitutional barrier against possible tyranny by the overzealous prosecutor. The considerations of justice, economy, and convenience that have propelled the movement for consolidation of civil cases apply with even greater force in the criminal context because of the constitutional principle that no man shall be vexed more than once by trial for the same offense.

The Court of Appeals for the Second Circuit in the cases of *U.S. v. Cioffi*, ____ F.2d ____ (2d Cir., October 1, 1973), and *U.S. v. Sabella*, 272 F.2d 206, 212 (2d Cir., 1959), recognized, applied and reaffirmed "the same transaction" test as a bar to a second litigation.

> The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone. The defendant may not later be tried again on the same fact situation, where no additional fact need be proved, *even though he be charged under a different statute.* He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. Here there was one sale of narcotics. The Government should have but one opportunity to prosecute on that transaction. *United States v. Sabella*, supra, at 212. [Emphasis supplied]

In the situation involving the Appellant we have what amounts to a situation patently, fundamentally unfair.

All the facts alleged and proved in this case in New York were already fait accompli at the time of his guilty plea in Florida in April, 1971. The agents who were involved in the Florida prosecution were the same ones who later testified in the New York prosecution. The overt acts alleged in the Florida case as to Ortega constituted the same events and time period as in the New York case. And yet, the Government which instigated the plea negoti-

ation and agreed to it, at no time ever notified Appellant or his counsel that he faced further charges on the same events at some time in the future. To argue, as the Government may attempt to do so, that this may be a good argument to set aside his prior guilty plea is ludicrous. It does not give him back the fifteen (15) months he has already served in the penitentiary. The twelve (12) year sentence imposed is a mockery of the true intent of the theory of plea negotiation. It has put the Appellant in the position of receiving two consecutive sentences of five (5) years and twelve (12) years for the same crime or set of facts.

The Appellant would add that this Court pave the road to a realistic meaning of the fundamental right of double jeopardy. Counsel recognizes that most of the more recent cases especially those dealing with the identity of offenses, betray an inclination to rely on precedent at the sacrifice of genuine analysis. The strict dependence of the Courts upon the "identical evidence test" is an example of the type of literalism which must be abandoned when the issue involves a man's life or freedom. Application of this test has resulted, in several instances, particularly in the narcotics cases, in the abandonment of substance for form. The reliance of the Courts on the "intent of Congress" to determine whether the two offenses are identical forsakes the role of the Courts as a check to the powers of the Legislature. Whether Congress intended to create two offenses or to create degrees of the same offense does not resolve the question of the constitutionality of the statutes.

The test of identity should be that suggested by Justice Rutledge in the opinion of *District of Columbia v. Buckley*, 128 F.2d 17, at 21, wherein he says:

> On narrow technical distinctions of method, means and specific intent, men may be convicted of the same general offense once, twice or many times, simultaneously or successively, as the prosecuting official determine in their discretion. Some of the refinements are so thin that, if they hold, the old and substantial protection against trial or conviction more than once for the same offense is but a shadow of its intended self. The "same or different evidence" rule only points out the difference. It puts no limit to how narrow the legislature can make it. I think the courts have a duty to do that . . . In other words, it is for them finally to say whether a distinction prescribed by the legislature is strong enough to overcome the constitutional guaranty.

The inquiry should not end at a determination that a difference exists between the two offenses. Rather, it should continue so as to examine the quality of the difference; and if it is insubstantial in relation to the purpose of the statute and the interest it seeks to protect, the difference should be ignored and a conclusion of double jeopardy should follow.

Wherefore, the Appellant respectfully moves for reversal of the conviction and sentence from which he appeals.

Respectfully submitted,
/s/ Max B. Kogen

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was mailed to the HONORABLE PAUL J. CURRAN, United States Attorney, attention SHIRAH NEIMAN, Assistant United States Attorney, United States Courthouse, Foley Square, New York, New York, 1007; and to MR. ROKOF, c/o the HONORABLE IRVING R. KAUFMAN, Chief Judge, United States Court of Appeals for the Second Circuit, United States Courthouse, New York, New York, this 16th day of July, 1974.

/s/ Max B. Kogen

MAX B. KOGEN, P.A.